DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 04-AA-104 & 04-AA-149

JMM CORPORATION, PETITIONER,

v. CI-5875-02 & CI-5958-03

DISTRICT OF COLUMBIA BOARD OF APPEALS & REVIEW, RESPONDENT.

On Petition for Review of Decisions of the
District of Columbia Board of Appeals and Review

(Argued January 3, 2006 Decided February 15, 2006)

Before REID, GLICKMAN, and FISHER, *Associate Judges.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: The Petitioner in this case, JMM Corporation ("JMM"), challenges an order of the Respondent, the District of Columbia Board of Appeals and Review ("BAR"), dismissing its appeals of two decisions handed down by Administrative Law Judges of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA").[1] We conclude that neither BAR nor OAH had jurisdiction over the appeals and that they should have been filed with the Board of Zoning Adjustment ("BZA"). Furthermore, because DCRA gave erroneous information in one case and arguably confusing information in the other case regarding JMM's appeal rights, the dismissal by BAR/OAH should be without prejudice. Therefore, we direct that the BAR/OAH dismiss JMM's appeals without prejudice to the filing of an appeal with the BZA within thirty days of the issuance of our mandate in this case, and we further instruct that the BZA should consider the appeals as if they had been filed in a timely manner.

FACTUAL SUMMARY

DCRA issued two notices of infraction to JMM on September 10 and 13, 2001, for failure to comply with the conditions of its Certificate of Occupancy ("COO"), B176169, authorizing it to operate a video membership store in the 900 block of 5th Street, N.W. The COO specifically stated "not sexually oriented." DCRA charged JMM with operating a sexually oriented business establishment ("SOBE"). In No. 04-AA-104 (CI-5875-02),

[1] JMM filed motions for reconsideration in both cases, but the BAR only issued an order denying the motion for reconsideration in one of the cases, although Respondent argues that the order actually covered both cases. Subsequently, JMM filed a second motion for reconsideration of both decisions, but the District of Columbia Office of Administrative Hearings ("OAH"), which assumed jurisdiction over BAR cases, issued an order denying the motions on the ground that BAR and OAH rules did not permit a second motion for reconsideration.

Administrative Law Judge Lennox J. Simon found JMM in violation of its COO because it operated a SOBE despite the explicit prohibition in its COO, and ordered JMM to pay a $500.00 fine for each infraction. The section of Judge Simon's order relating to appeal rights specified that: "In general all civil infraction orders are appealable to the [BAR]. There are a few exceptions." This section of the order also indicated, however, that "[i]f [the] matter concerns a violation of the D.C. Zoning Regulations . . . then [the] matter is appealable to the [BZA]." JMM's appeal to the BAR was "dismissed for want of jurisdiction." BAR also denied JMM's motion for reconsideration.

On February 27, 2002, DCRA took steps to revoke JMM's COO (B176169) and its Mechanical Amusement License ("MAL") (No. 31005263) by serving JMM with notices of intent to revoke the COO and the MAL. A two-day hearing was held in July 2002, and on December 9, 2002, Administrative Law Judge Henry W. McCoy, issued an order in No. 04-AA-149 (CI-5958-03) revoking JMM's COO and its MAL. The section of Judge McCoy's order concerning appeal rights stated that an appeal "must be filed with the [BAR]." Similar to JMM's appeal in No. 04-AA-104, its appeal in No. 04-AA-149 was "dismissed for want of jurisdiction." Although JMM moved for reconsideration, the BAR did not render a decision on its motion. The Respondent maintains that the order denying reconsideration in No. 04-AA-104 also covered the reconsideration motion in No. 04-AA-149.

ANALYSIS

JMM argues that the BAR should have decided its appeals on the merits, or that, at the very least, the matters should be remanded to the BZA because "Judge Simon's order . . . did not properly advise [JMM] on the right place to appeal . . . .," and because Judge McCoy's order directed it to file an appeal with the BAR, not the BZA. The District contends that "JMM was required to appeal to the BZA from the DCRA [Administrative Law Judge] decisions because they involve the zoning regulations and such matters must be appealed to the BZA." The District maintains that the appeal of Judge Simon's order was properly dismissed because the section of the judge's order concerning appeal rights stated that matters concerning a violation of the zoning regulations are appealable to the BZA. The District agrees, however, that the appeal section in Judge McCoy's order incorrectly stated that JMM must appeal to the BAR.

Statutory provisions relating to the jurisdiction of the BAR, the OAH, and the BZA indicate that the BAR is not the proper forum for an appeal pertaining to a zoning regulation. D.C. Code § 2-1803.01 contains a specific exception to the BAR's jurisdiction with respect to appeals involving the District's zoning regulations:

> Except as provided in § 2-1831.16, the District of Columbia Board of Appeals and Review shall entertain and determine appeals timely filed by persons aggrieved by orders issued by hearing examiners . . ., except that appeals involving infractions of . . . the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment . . . .

D.C. Code § 2-1803.01 (2001). Section 2-1831.16 (b) provides that specified agencies may retain jurisdiction to hear appeals of Administrative Law Judge decisions, but does not include the BAR:

> (b) Any agency, board, commission, or body of an agency identified in subchapter III of this chapter, other than the Board of Appeals and Review, shall retain jurisdiction to entertain and determine appeals from orders of Administrative Law Judges, as granted in that chapter.

D.C. Code § 2-1803.01 (Supp. 2005). Thus, it is abundantly clear that the BAR did not have jurisdiction to hear the appeals in these cases since they involved infractions and violations of the District's zoning regulations under which certificates of occupancy are issued. *See* D.C. Code § 6-641.09 (2001). The Office of Administrative Hearings Establishment Act of 2001, D.C. Code §§ 2-1831.01 *et seq.*, did not assign responsibility for zoning matters to the OAH, and the BZA continues to retain jurisdiction over administrative proceedings, including appeals, pertaining to those matters. *See* D.C. Code § 2-1831.03 (a) (3) and (b) (2) (OAH has jurisdiction over adjudicated cases handled by the BAR and the DCRA). The statute governing the jurisdiction of the BZA explicitly authorizes that agency to handle matters concerning certificates of occupancy:

> Appeals to the Board of Adjustment may be taken by any person aggrieved . . . by any decision . . . granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter . . . .

D.C. Code § 6-641.07 (f). Furthermore, 16 DCMR § 3118.10 of the District's regulations concerning civil infractions and a certificate of occupancy states:

> Appeals involving infractions of laws relating to zoning . . ., and rules issued pursuant thereto, shall be heard by the District of Columbia Board of Zoning Adjustment.

16 DCMR. § 3118.10 (1998).

Finally, in *Felicity's, Inc. v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 817 A.2d 825 (D.C. 2003), a case almost identical to the one before us, we held that the BAR "was . . . without subject matter jurisdiction to hear Felicity's appeal . . ." because it "'involv[ed] infractions of laws relating to zoning . . . and rules issued pursuant thereto . . . ,'" and such matters "shall be heard by the District of Columbia Board of Zoning Adjustment." *Id.* at 829 (citing 16 DCMR § 3118.10 (1998)). Similarly, in *Walsh v. District of Columbia Bd. of Appeals and Review*, 826 A.2d 375 (D.C. 2003), we "h[e]ld . . . that the BAR lacked subject matter jurisdiction to consider the fines related to a certificate of occupancy" because such matters "fall within the jurisdiction of the Board of Zoning Adjustment, not the BAR." *Id.* at 377 (citing D.C. Code § 2-1803.01 (2001)). Citing *Felicity's*, *supra*, we also said: "The BAR therefore should have dismissed Walsh's appeal from the ALJ's ruling with respect to the certificate of occupancy." *Walsh, supra*, 826 A.2d at 377. In short, the BAR did not err in dismissing JMM's appeals due to its lack of subject matter jurisdiction.

There is an additional consideration in the case before us, however. In No. 04-AA-149 (CI-5958-03), the appeal instructions attached to Judge McCoy's order directed JMM to file an appeal with the BAR "within fifteen (15) days from the receipt of [the] decision." This was incorrect since the appeal had to be filed with the BZA. Moreover, in No. 04-AA-149 (CI-5875-02), JMM arguably could have been confused by the appeal instructions even though they included a statement that "[i]f [the] matter concerns a violation of the D.C. Zoning Regulations . . . [it] is appealable to the Board of Zoning Adjustment." The instructions began by indicating that JMM had "fifteen (15) calendar days [from the receipt] of [the ALJ's] Order in which to appeal, but stated that generally appeals of "all civil infraction orders are appealable to the [BAR."]. JMM may well have thought that its challenge to the District's sexually oriented business enterprise regulations did not fall within the jurisdiction of the BZA.[2] Consequently, the dismissal by the BAR/OAH should have been without prejudice. Therefore, we direct that the BAR/OAH dismiss JMM's appeals without prejudice to the filing of an appeal with the BZA within thirty days of the issuance of our mandate in this case, and we further instruct that the BZA should consider the appeals as if they had been filed in a timely manner. *See Felicity's, supra*, 817 A.2d at 829 n.4.

Accordingly, for the foregoing reasons, we affirm the agency's dismissal of JMM's appeals, but direct that the dismissal be without prejudice to permit JMM to file its appeal with the BZA.

So ordered.
ENTERED BY DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

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[2] Since the limited issue before us focuses on the BAR's jurisdiction, we do not consider JMM's facial challenge to the constitutionality of the District's regulations.

IN THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

MATTER OF JMM CORPORATION,

INITIAL ARGUMENTS OF JMM CORPORATION

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellant JMM Corporation's two consolidated appeals challenge enforcement actions against Appellant JMM Corporation that arose in the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), pursuant to the DCRA's efforts to enforce its regulations governing sexually oriented business establishments (SOBE's) and its efforts to revoke Appellant's certificate of occupancy and mechanical amusement license.

B. COURSE OF THE PROCEEDINGS

On July 2, 2002, as a result of a contested hearing at which undersigned counsel defended Appellant, DCRA Administrative Law Judge Lennox J. Simon ruled as follows below in Appel. No. 04-AA-000104: (1) ruled that Appellant was in violation of two notices of infraction alleging that Appellant was operating a SOBE without having a SOBE certificate of occupancy, and (2) ruled that the Office of Enforcement issue a cease and desist order for Appellant to cease all business at its location until obtaining "the required Certificate of Occupancy for his business." App. 44-50.

Appellant filed a timely notice of appeal therefrom with the District of Columbia Board of Appeals and Review; the Board of Appeals then assigned BAR Docket No. CI5875-02.

On December 6, 2002, DCRA Administrative Law Judge Henry McCoy ruled as follows below in Appel. No. 04-AA-000149: (1) revoke Appellant's certificate of occupancy issued in 1996, and (2) revoke Appellant's mechanical booth license renewed on June 1, 2001.

Appellant filed a timely notice of appeal therefrom with the District of Columbia Board of Appeals and Review, the Board of Appeals assigned BAR Docket No. CI5958-03.

After directing Appellant to provide lengthy (and expensive) transcripts from the DCRA Office of Administrative Hearings[1], and after Appellant submitted an in-depth, formal brief to the Board of Appeals and Review, pursuant to the Board of Appeals' imposed deadline (filed on November 20, 2003), by certificate of service dated January 30, 2004, the Board of Appeals *sua sponte* dismissed both appeals below -- which had been consolidated by the Board of Appeals -- for alleged want of jurisdiction, without reaching any merits of either appeal. App. 26.

On February 9, 2004, Appellant filed timely Motions to reconsider the Board of Appeals' *sua sponte* dismissal. App.22, and 23. The Board of Appeals only three days later, on February 12, 2004, denied Appellant's motion to reconsider for BAR Docket No.

[1] While Appellant was able to provide the Board of Appeals a complete transcript of the two-day March 2002 hearing before ALJ Lennox Simon, the DCRA provided Appellant with an entirely inaudible set of audiocasettes from the July 29-30, 2002, hearing before ALJ Henry McCoy. App. 53-59. Had the Office of Administrative Hearings not terminated proceedings before that tribunal, undersigned counsel would have added to the Office of Administrative Hearings' record that the audio CD-ROM -- purportedly of the July 29-30, 2002, hearing before ALJ McCoy -- that was subsequently provided to undersigned counsel by the DCRA's Office of Adjudication had no sound whatsoever, when carefully checked by undersigned counsel and the owner of Bradford & Associates court reporters in Arlington, Va. Had the Office of Administrative Hearings not terminated proceedings below, undersigned counsel also would have filed a request for permission to hear the master recording of the July 29-30 DCMR Office of Adjudication proceedings to see if even the master recording was audible.

CI5875-02, but did not rule at that time on Appellant's motion to reconsider in BAR Docket No. CI5958-03. The Board of Appeals' February 12, 2004, Order only lists BAR Docket No. CI5875-02. App. 20.

Moreover, as of that particular time (Feb. 12, 2004), the deadline to file an initial reconsideration motion had not even passed yet. The governing regulations provide for a reconsideration motion to be filed within ten days after an order is issued, 1 DCMR § 513.1, which brings us to February 9, 2004, at the earliest (from the January 30, 2004, *sua sponte* dismissal). The governing regulations provide an additional five days to file the reconsideration motion where, as here, the order was mailed to the parties (App. 5-21), 1 DCMR § 501.5, which brings us to February 14, 2004, at the earliest. Because February 14, 2004, was a Saturday and Monday February 16, 2004, was Martin Luther King, Jr., Day, Appellant had until the next business day that was not a legal holiday (*i.e.,* February 17, 2004) to file its motions regarding the reconsideration issue. *Id.*

Fax service is not provided for by the Board of Appeals' rules, so Appellant was not under proper legal notice that fax service from the Board of Appeals would suffice for triggering the deadline for filing this Motion.

On February 17, 2004, Appellant filed subsequent motions that led the Board of Appeals on March 9, 2004, to order Appellee to file a reply to Appellant's reconsideration motions. App. 4-19.

The Board of Appeals issued its March 9, 2004, favorable order regarding reconsideration of the *sua sponte* dismissal (App. 4), which Order was issued more than thirty days after the Board of Appeals dismissed the action below (App. 26). On February 27, 2004, Appellant filed timely petitions for review to the District of Columbia Court of Appeals.

Despite the fact that the Board of Appeals (1) never denied Appellant's motion to reconsider in BAR Docket No. CI5958-03 and (2) was persuaded to rule substantively on Appellant's reconsideration motions (App. 4), on March 9, 2004, the Office of Administrative Hearings, which succeeded the Board of Appeals, purported to deny Appellant's motions to reconsider the Board of Appeals' order dismissing the appeals below. App. 1-2.

The Office of Administrative Hearings erroneously concluded that the Board of Appeals had denied Appellant's motions to reconsider the *sua sponte* dismissal as to <u>both</u> the administrative appeals (App. 1-2), whereas in reality the Board of Appeals only denied the motion to reconsider in BAR Docket No. CI5875-02 (which was presided over by DCRA ALJ Lennox Simon in March 202). App. 20. The Office of Administrative Hearings erroneously disregarded Appellant's motions found at App. 5 and 12, and the Board of Appeals' decision to deal with the merits of the issues raised therein (App. 4), by noting the absence of rules enabling the filing of a second reconsideration motion (even when the governing law says nothing to prevent a second or supplemental reconsideration motion, particularly when time has not yet run out for filing the first reconsideration motion). The Office of Administrative Hearings showed its own confusion in the matter by concluding in the last paragraph that "Appellant's Motion to Amend Order denying a

Reconsideration of Order Dismissing Appeal, filed with the Board on February 17, 2004, is DENIED." App. 2, even though said motion only related to the DCRA ALJ Simon case, and not to ALJ McCoy's case.

In other words, at once the Office of Administrative Hearings stated that "the Board's denial of appellant's motion for reconsideration marked the end of this administrative appeal" (App. 2), ignored the fact that the Board denied only the reconsideration as to DCRA ALJ Simon's case, and ignored or did not know about the Board of Appeals' decision to revisit its dismissal of the action (App. 4). Therefore, the Office of Administrative Hearings ruled incorrectly on April 26, 2004, whether due to confusion, due to haste, or due to being without a complete Board of Appeals record (undersigned counsel learned through a personal visit around early April 2004 that the Office of Administrative Hearings' had taken over the office space previously occupied by the Board of Appeals, but that the Office of Administrative Hearings at that time could not locate the documents recently filed in this case).

On February 15, 2006, the District of Columbia Court of Appeals ordered that JMM Corporation has thirty days (by March 17, 2006) to file its consolidated appeals with the BZA. *See* Court of Appeals Order at 1 (attached to these consolidated appeals).

STATEMENT OF MATERIAL FACTS

Except where otherwise noted in this brief, Appellant relies on the following material facts.

The case before DCRA ALJ Lennox Simon

Since 1996, Respondent J.M.M. Corporation (Respondent), trading as Fun Fair Video, has been operating at 919 5th Street, NW, except for being closed part of 2000-2001, and reopening in 2001. J.M.M.'s Certificate of Occupancy ("COO") includes the phrase "not sexually oriented." No businesses in the District of Columbia have a COO for a SOBE. Testimony of then-Acting Zoning Administrator Toye Bello (March 8, 2002) (T2-70).[1] Unless a business has a SOBE COO, the COO automatically says not sexually oriented. 11 DCMR §§ 744 and 754.

Respondent is located in zoning district C-2-C. T1-338. The District of Columbia's (the District's) Municipal Regulations only speak of permitting SOBE's in zoning districts C-3-C and C-4, 11 DCMR §§ 744 and 754, but only if permitted by the Board of Zoning Adjustment after a finding the that the business meets the stringent requirements set forth in said regulatory provisions. Consequently, numerous retail businesses in the District sell sexually explicit material without having SOBE COO's. T2-69.

The NOI's against Appellant were issued September 10 and 13, 2001. However, no evidence was presented at the hearing of anything but a cursory inspection in 2001 of Appellant's premises taking place before September 21, 2001.

Appellant's store includes two sections that only adults over twenty-one years old may enter, those sections being the adult video and DVD section (Adult Video Section), and the other being the section for video viewing booths (Booth Section). T1-260-61.

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[2] The trial transcript before ALJ Simon is designated as T1 for March 5, 2002, and T2 for March 8, 2002).

Appellee presented sketchy and incomplete testimony about the floor space taken up by each part of the store. Although Appellee presented testimony about the size of the Booth Section, T1-145-48, Appellee did not provide testimony about the amount of floor space taken by each booth, nor the amount of floor space taken by the Adult Video Section. Although Appellee presented testimony with a count of some merchandise, T1-94, Appellee's witnesses never made clear the extent to which a full count -- if any -- was made, nor the basis on which the count was made (e.g., whether the witnesses counted all videos and DVD's that were only on the retail floor area, and/or the merchandise not on the retail floor); whether videos and DVD's were classified as X-rated depending on whether they were located in the Adult Video Section, or whether the witness made a subjective conclusion about whether the item was X-rated (not a term of legal art, nor a rating governed by the Motion Picture Association of America), and how Appellee's witnesses ever thought that the non-precise term "X-rated" could establish that an item was "sexually oriented" as governed by the SOBE regulations.

Appellant presented the testimony of private detective and former District Metropolitan Police Officer William Vain, T.1-246, who visited the Appellant's premises unannounced on two occasions, once in February 2002, and again in early March 2002. T1-248-52. Mr. Vain produced a fully detailed and fully measured map of the premises (the map is part of the record in this instant appeal, and was admitted into evidence as JMM Corp's Exhibit 1 (T1-267-69)), whose layout has not changed between the time the NOI's were issued and the time that private detective Vain visited. T1-253-54. Mr. Vain's testimony showed that he spent meticulous time, effort and ability to produce an accurate diagram of the premises. *Id.*

Mr. Vain's diagram and testimony show that Appellant's floorspace is 1522 square feet (see bottom right hand corner of diagram), and that the Adult Video Section comprises about 100 square feet (or less than 7% of the store's total floor space).

Each of the video booths measures 5 feet by 3 feet, Vain Diagram, which amounts to 15 square feet per booth multiplied by eight booths currently in operation, which amounts to 120 square feet taken by the eight video booths (or 7.9% of floorspace) that currently function.

Mr. Vain took a meticulous count of Petitioner's merchandise, and the listing of his results was admitted into evidence (T1-280-81). Of the merchandise on the retail sales floor, the items in the Adult Video Section (553 videos and DVD's) comprised less than 12% of all video's and DVD's in the non-adult and adult retail sections (4766 total videos and DVD's were in both sections).

Appellee provided no evidence about the amount of income or revenue that Appellant derives from the store. Appellee's proposed findings of fact to ALJ Simon presented an unsupported claim that 75% of Appellant's "stock and trade" is sexually oriented. At best for Appellee, the evidence reveals a store that devotes the vast majority of its floor space and merchandise units to items that are not sexually explicit. The store's inventory includes action, Spanish, adventure, martial arts, suspense, horror, thriller, and children's DVD's. *See* Bill Vain list (Appellant's Ex. 3 before DCRA ALJ Simon, below).

The Adult Video Section and Booth Section are kept in the back of the store, only people over 21 years old are allowed in that section, and an employee is kept in the Booth Section to monitor and clean the area. T1-259-65.

The case before DCRA ALJ Henry McCoy

Appellant's evidence before ALJ Henry McCoy was similar to the evidence that was presented before DCRA ALJ Lennox Simon. Unfortunately, the Office of Administrative Hearing's final denial of reconsideration relief prevented Appellant from determining whether the master recording of the ALJ McCoy hearing was defective (since the audiotape and subsequent audio CD-ROM provided by the DCRA Office of Adjudication to undersigned counsel respectively were fully defective in sound, and fully lacking in sound), and prevented Appellant from filing a motion for access to the master recording, and for time to produce a transcript from the master recording (if it was sufficiently audible) or a motion to order a retrial before the DCRA Office of Adjudication, in order to obtain a correct trial record (particularly because the DCRA operated all recording equipment, and because an accurate transcript or tape recording helps assure the accuracy of the Spanish-language testimony that took place when Appellant's owner Jose Montiel took the witness stand).

ARGUMENT

1. Appellant incorporates by reference its attached Prehearing statements before the DCRA's Office of Adjudication.

2. The District's SOBE regulations are unconstitutional, and the DCRA's Office of Adjudication erred by refusing to consider any Constitutional issues raised below by Appellant.

a. **<u>Appellant is not a SOBE AND DOES NOT REQUIRE A SOBE COO.</u>**

Appellee, at all stages, has the burden to prove the alleged violation by a preponderance of the evidence. D.C. Code § 2-1802.03. As explained herein, Appellee did not meet this burden.

The DCMR (at 11 DCMR § 199.1) does not provide sufficient guidance for a retail business to know whether it will qualify as a SOBE, nor precisely which merchandise qualifies towards the SOBE definition. Neither the District's City Council nor the District's agencies have set forth a more detailed formal explanation of what qualifies as a SOBE. The closest we have is the 1998 informal and non-binding (*i.e.,* not binding on Appellant) opinion of then-Acting Zoning Administrator Gladys Hicks (the Hicks Opinion, at App. 78). However, the Hicks Opinion did not go through the formal rulemaking process that is necessary to give it the force of law. App. 78.

An unbroken chain of District zoning administrators and acting zoning administrators have agreed not to enforce against businesses that follow the Hicks Opinion and existed when the Hicks Opinion was issued. T2-71-73. The problem with the Hicks Opinion is that it creates almost as many questions as it answers, by going on for several pages talking about a 15% standard on the one hand, but then not sufficiently defining the basis of the 15% (e.g., whether the 15% is based on floor space, unit-per-unit inventory, or any other standard). Particularly under such circumstances, businesses must be given the benefit of the doubt as to whether they qualify as SOBE's. Moreover, the SOBE definition and the Hicks Opinion are so vague and overbroad as to render the

District's SOBE regulatory scheme unconstitutional under the First Amendment and under the due process guarantees provided under the Fifth and Fourteenth Amendments to the United States Constitution. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) (confirming that the First Amendment is violated by overly vague and overbroad regulations of expression).

Even assuming, *arguendo*, no constitutional infirmity in the District's SOBE regulatory scheme, the District cannot prevail here. *First*, concerning the Hicks memorandum, App. 78, there is nothing in the SOBE definition to show that 15% somehow distinguishes a SOBE from a non-SOBE; it is the job of the District's legislators and/or administrative rulemakers to make such distinctions by the formal lawmaking process. Because such a lawmaking process has not yet taken place, this Court will not define a SOBE under such a narrow definition.

Second, Appellee certainly is not entitled to ask for a more stringent SOBE definition than the one set forth in the Hicks Opinion. To do otherwise would be for the government to tell businesses that they have a certain safe harbor, but then to trample on that safe harbor the next day. Gladys Hicks drafted and adopted the Hicks Opinion. Her successor, acting zoning administrator Michael Johnson applied the Hicks Opinion to businesses like Appellant and others that already existed when the Hicks Opinion was issued. Johnson hearing transcript at p.21 (May 23, 2000, testimony excerpt, admitted into evidence on March 8, 2002). Mr. Johnson's successor, then-Acting Zoning Administrator Toye Bello, testified on March 8, 2002, that he fully adheres to the Hicks Opinion, and that Appellant will be permitted to operate within the provisions of the Hicks Opinion. T2-71-73.

After Appellant's prior NOI hearing of May 23, 2000, Appellant's predecessor counsel, Mr. Adgie O'Bryant, retained Ms. Hicks on Appellant's behalf -- when Ms. Hicks was back in the private sector -- to advise Respondent how to comply with the Hicks Opinion. T2-125. As confirmed by the testimony of Mr. O'Bryant and Appellant's owner Jose Montiel, Ms. Hicks advised that up to ten video viewing booths were permissible at Appellant's store, and Ms. Hicks also showed the floor area that would be permissible for a section selling sexually explicit merchandise. Mr. Montiel testified that he fully adhered to the advice of Ms. Hicks.

Appellant cannot be seen as culpable, seeing that Appellant, in good faith, was following the advice of Gladys Hicks, who was the very same person who issued the Hicks Opinion that all her successors have adhered to as to businesses that existed at the time her opinion was issued. To be liable, one must have the necessary liable intent; Respondent had no such intent.

b. The District of Columbia's SOBE regulations are unconstitutional for being enacted by agency regulation rather than by an act of the District of Columbia City Council. The District's SOBE regulations are unconstitutional by being a creature of agency enactment and not by being created and passed by the City Council. The proper purpose of administrative agencies is to administer regulations of First Amendment-protected activity, including sexually-related entertainment, and not -- as here -- to be using its unbridled discretion in both enacting, enforcing and ruling (in the case of ALJ Simon) on such restrictions. *FW/PBS, Inc., v. Dallas*, 493 U.S. 215, 225-26 (1990) (confirming that placing "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.")

In other words, not only are the District's SOBE regulations unconstitutional, but ALJ Simon -- who is an employee of the same agency he was ruling over in this case (the DCRA) -- lacks sufficient indicia of independence to have made a just, fair and constitutional decision in the first place. In fact, Judge Simon utterly refused to rule on any Constitutional issues in this case that cannot be fairly ruled upon without deciding the underlying First Amendment issues. *FW/PBS*, 493 U.S. 215 and T1-54 (where Judge Simon utterly refuses to address any of the many First Amendment issues raised by Appellant). Judge McCoy committed the same blunder. App. 29-30.

c. The District's SOBE regulations are unconstitutional for being vague, overbroad, and in violation of the First Amendment's protections of free speech and free expression, where, *inter alia*, the SOBE regulations were enacted without the use of reasonably reliable studies showing negative secondary effects of such businesses as Appellants, and where the regulations place unconstitutionally unbridled discretion in the Board of Zoning Appeals in issuing and revoking SOBE certificates of occupancy ("COO's").

i. The SOBE regulations failed to properly use any sufficient negative secondary effects studies. The District's SOBE regulations are unconstitutional, because before governments can impose requirements for adult businesses to obtain permission to operate as an adult business, rather than as a garden variety business, governments first must show: (1) proof that the government has reasonably relied on sufficient studies showing negative secondary effects of adult entertainment; and (2) proof that a sufficient number of alternate available sites exist to accommodate a municipality's adult entertainment businesses. *Los Angeles v. Alameda Books,* 122 S. Ct. 1728 (2002).

The record fails to establish that Plaintiff has met either of these hurdles. Moreover, because ALJ Simon and ALJ McCoy refused to entertain any First Amendment or other Constitutional arguments, T1-54 and App. 29-30, this made Appellant unable to develop the trial record below to confirm this. Moreover, the District of Columbia's filing of the administrative record for passage of the SOBE regulations -- in Appellant's United States District Court litigation against the District (*JMM v. DC, et al., Civ. Act. No. 1:02CV40)* (dismissed to permit state-level proceedings first to be completed) -- also shows an absence of even one page of documentation addressing studies showing negative secondary effects of businesses providing adult entertainment.

Before Plaintiff can be permitted to enforce its SOBE regulations, Plaintiff has the burden of proof on the foregoing issues. P*hiladelphia Newspapers, Inc., et al. v. Hepps et al.,* 475 U.S. 767, 777 (1986). Specifically:

> In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. *See Consolidated Edison Co. v. Public Service Comm'n of N.Y.,* 447 U.S. 530, 540 (1980) (content-based restriction); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (speaker-based restriction); *Renton v. Playtime Theatres, Inc.,* [475 U.S. 41, 51-53 (1986)] (secondary-effects restriction). *See also Speiser v. Randall*, 357 U.S. 513 (1958) (striking down the precondition that a taxpayer sign a loyalty oath before receiving certain tax benefits).

Id.

Although *Alameda* did not get five justices signing onto the same opinion, we see from reading Justice Kennedy's concurrence together with the four dissenters' opinion (which creates a majority of justices), that the distinction between content-based and content-neutral regulations in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is "something of a fiction." Alameda, 122 S. Ct. at 1741 (Kennedy, J., concurring). *Renton*, therefore, is now less reliable in conducting secondary effects analysis, and Alameda places a stiffer burden no municipalities in proving reasonable reliance on sufficient secondary effects studies.

Justice Kennedy's concurrence in *Alameda Books* goes as far as to call for a trial to allow a challenge to the assumptions found in the secondary effects studies allegedly relied upon by the government in enacting the SOBE regulations. *Alameda Books,* 122 S. Ct. at 1733-34. Therefore, based on the foregoing discussion, *Alameda Books* establishes that ALJ Simon's July 2000 Order should not be enforced without at least holding a trial.

Moreover, it is outdated and unconstitutional to automatically assume negative secondary effects from sexually explicit businesses. For instance, in Fulton County, Georgia, a government-commissioned study determined that there was no statistical correlation showing an increase in crime at adult entertainment establishments that served alcoholic beverages. *Flanagan Enterprises, Inc., of Georgia v. Fulton County, Georgia*, 242 F.3d 976 (11th Cir. 2001). "Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages." *Id.* at 979. Moreover, in mid-1997, Fulton County's six adult entertainment establishments commissioned "a study of the clubs' economic impact on their surrounding environs." *Id.*

In Fulton County, Georgia, "[t]he study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volume and proposed development in the Clubs' vicinities." *Id.* at 979.

Here, the Appellee has failed to show reasonable reliance on sufficient secondary effects studies.

ii. <u>The SOBE regulations place unconstitutionally unbridled discretion in the hands of the government.</u> Moreover, the District's mechanism for providing SOBE COO's is so onerous and provides so much unbridled discretion in the hands of the administering agency, as to render the SOBE regulatory scheme unconstitutional. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 214, 225 (1990), and 11 DCMR 744, 754, 801, 602.1, and 11-902.1 (the main SOBE provisions).

It is not likely that Appellant will soon, if ever, be able to obtain a sexually oriented business establishment operating certificate in zones C-3-C and C-4, to which SOBE certificates are limited. *See* 11 DCMR § 744, *et seq.* and 11 DCMR § 754, *et seq.* Specifically, following are the provisions giving unbridled discretion in the District to decide who if any, and under what restrictions, may obtain a SOBE certificate:

> 11 DCMR § 744.1 & 754.1. A sexually-oriented business establishment shall be permitted in C-3-C [/C-4] districts only, if approved by the Board of Zoning Adjustment in accordance with the conditions specified in § 3108 of chapter 31 of this title, subject to the requirements of this section.

744.2 and 754.2. No portion of the establishment shall be located within six hundred feet (600 ft.) of a Residential or Special Purpose district.

744.3 and 754.3. No portion of the establishment shall be located within six hundred feet (600 ft.) of a church, school, library, or playground, or the area that is under the jurisdiction of the Commission of Fine Arts pursuant to the Shipstead-Luce Act, 46 Stat. 366, as amended.

744.4 and 754.4. No portion of the establishment shall be located within three hundred feet (300 ft.) of any other sexually-oriented business establishment.

744.5 and 754.5. There shall be no display of goods or services visible from the exterior of the premises.

744.6 and 754.6. The establishment shall be compatible with other uses in the area.

744.7 and 754.7. The use shall not become objectionable because of its effect on the character of the neighborhood or because of noise, traffic, or other conditions.

744.8 and 744.8. The establishment shall not have an adverse impact on religious, educational, and governmental facilities located in the area.

Additionally, the Board of Zoning Adjustment ("BZA") is the sole body that issues SOBE certificates. 11 DCMR §§ 744, *et seq.*, 754, *et. seq.*, and 3108. Not only do 11 DCMR 744 and 754 set forth overly restrictive requirements for qualifying for a SOBE certificate, but 11 DCMR 744 and 754 provide for the BZA to follow 11 DCMR § 3108, as quoted below, in issuing any such certificates:

> [T]he Board is authorized to grant special exceptions, as provided in this title where, in the judgment of the Board, those special *exceptions will be in harmony with the general purpose and intent of the zoning Regulations and Maps*, and will not tend to affect adversely the use of neighboring properly in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special condition specified in this title..."

11 DCMR 3108.1 (emphasis added).

d. ALJ Simon was without authority to issue any sanction other than a fine.

A money penalty is the only sanction available against Appellant in this proceeding. D.C. Code § 2-1802.03 (h). Consequently, this Court was without authority on June 20, 2000, to direct that Appellant be directed to cease business activity until obtaining a "required" COO (ALJ Simon does not describe the type of COO). Even if the Court had such authority, Appellee did not request any remedy other than a fine.

Judge McCoy's ruling displayed the unconstitutional unbridled discretion that is prohibited by *FW/PBS, supra.*

e. ALJ McCoy was without authority to revoke Appellant's COO and Mechanical Amusement License for reasons including those listed above, and for further arguments to supplement these Initial Arguments.

CONCLUSION

For the foregoing reasons, ALJ Simon's and ALJ McCoy's orders should be reversed.

Respectfully submitted,

____

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF ADJUDICATION

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OFFICE OF ADJUDICATION

MATTER OF J.M.M. CORPORATION	*
	* CASE NUMBERS
	* 2002-OAD-003/004
Respondent.	*

RESPONDENT'S CORRECTION TO PREHEARING STATEMENT, AND MOTION TO DISMISS THIS PROCEEDING

Respondent, by undersigned counsel, hereby substitutes the attached corrected Hearing Memorandum for the one that was originally attached to Respondent's Prehearing Statement.

The attached corrected Memorandum corrects typographical errors that were inadvertently left in the version that was originally submitted with the Prehearing Statement, and updates the Supreme Court's Treatment of *Los Angeles v. Alameda Books, Inc.*, 222 F.3d 719, (9th Cir. 2000), *rev'd. on other gds.*, ____ U.S. ____, 122 S. Ct. 1728 (2002).

Moreover, similar to the arguments in Respondent's attached Hearing Memorandum, Respondent moves to dismiss this current cause of action, as the government is estopped from now relitigating the same issues that it litigated in the March 2002 hearing of *DCRA v. JMM Corporation*, DCRA Office of Adjudication Case Numbers 01-OAD-2626E and 01-OAD-2541G. The government had the choice to move to consolidate both actions, but did not do so.

64

Respectfully submitted

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Correction to Pretrial Statement was served by telecopier on July 22, 2002, to:

Matthew Green, Jr., Esquire
DCRA
941 North Capitol Street, N.E.
Suite 9400
Washington, DC 20002
Phone: (202) 442-8402
Fax: (202) 442-9447
e-mail: matthew.green@dc.gov

Jonathan L. Katz

65

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF ADJUDICATION

DCRA	*
v.	* CASE NUMBERS 01-0AD-2626E
J.M.M. CORPORATION	* 01-OAD-2541G
Respondent	* INFRACTION NUMBERS 028120 AND 035446
	*
	HEARING: 3/5/02

RESPONDENT J.M.M. CORPORATION'S HEARING MEMORANDUM

I. INTRODUCTION

Respondent J.M.M. Corporation ("JMM") hereby respectfully presents this hearing memorandum on some key issues to be presented at Respondent's above-listed hearing.

II. ARGUMENT

A. Respondent Moves to Dismiss This Action or, in the Alternative, to Postpone the Hearing To Avoid Duplicative Proceedings, Unfair Surprise, and Witness Unavailability to Respondent

A new development took place on March 1, 2002, in this administrative action that supports dismissing the above-captioned action. Specifically, without the government's notification of undersigned counsel, the government served Respondent with the following two documents ("Government Notices") on March 1, 2002: (1) Government's Notice of Intent to Revoke Certificate of Occupancy Number B82013; and (2) Government's Notice of Intent to Revoke Mechanical Amusement License Number 31005263.

66

Both of the above-mentioned notices include allegations of fact that substantially overlap with the time frames and factual allegations involved in the above-captioned action. For instance, both notices, which mainly duplicate each other, address visits to Respondents' premises that were allegedly made on dates including September 1 and 21, 2001, which is from the same month that Respondent's NOI's were dated for the instant action. Undersigned counsel expects that many of the same factual and legal issues will be covered both on the current NOI hearing, and at the new hearing to be scheduled on the Government Notices.

It is neither fair nor proper for the government to force Respondent into two hearings that will address such similar issues, facts and law. Therefore, because the current NOI's fully overlap with the allegations in the Government notices, the current NOI's should be dismissed. Alternatively, the hearing on the current NOI's should be consolidated with the hearing to be held on the Government Notices. To do otherwise will cause an undue strain on Respondent's resources (Respondent, e.g., is paying an hourly rate to his investigator witness, who is to testify at all hearings, and an hourly rate for a Spanish interpreter); and will not serve judicial economy.

B. Respondent Has Three Good Faith Grounds For Postponing the March 5 Hearing

Respondent requests a hearing postponement for the following grounds. *First*, Respondent filed a formal discovery motion with this Court on February 13, 2002, but has still received no ruling. This Motion became necessary when opposing counsel made

(67

no reply to Respondent's requests as far back as October 2001 for discovery; on March 4, 2002, opposing counsel confirmed his refusal to provide discovery. To force Respondent to go to the hearing without obtaining advance discovery will amount to an unfair trial by fire, with the government having full knowledge of the information it plans to provide at trial, but with the government's refusal to share that information.

Second, unless Respondent's above-listed request to dismiss this action is granted, it is important that this instant action be consolidated with the hearing on the above-described Government Notices.

Third, Respondent requests a postponement in order to obtain better results in delivering witness subpoenas and in getting witnesses to appear at trial. For instance, undersigned counsel had a process server deliver witness subpoenas to Respondent's predecessor counsel Adgie O'Bryant and James Wright, for purposes of proving that the NOI's are premature and should be dismissed, in that they were issued when Respondent was following the Gentlemen's agreement reached between Respondent's predecessor counsel and with the Zoning Administration for continuing to operate Respondent's business.

C. <u>The District of Columbia Has an Unconstitutional SOBE Regulation Scheme. The Proper Analytical Approach to this Case is to Not Even Reach A Decision on the Facts Without First Determining these Constitutional Issues.</u>

The District of Columbia's regulation scheme for sexually oriented business flies in the face of well settled Supreme Court

(68

and federal appellate principals for safeguarding the First Amendment in the face of municipalities' efforts to regulate adult entertainment businesses.

Current District of Columbia law -- exclusively set forth in municipal regulations and not by statue -- only permits sexually oriented businesses ("SOBE's") to be located in outside zone districts C-3-C and C-4. 24 DCR 5144 (Dec. 8, 1977); 11 DCMR 744, 754, 801, 602.1, and 11-902.1. Respondent is not located in either of these zones. Instead, JMM is located in zone C-2-C, which means JMM would have to move if it were required to operate with a SOBE certificate. As will be briefly discussed here, the DCMR's definition of a SOBE is unconstitutionally vague and overbroad, and the current system for approving SOPE certficates constitutes a system of unconstituional unbridled discretion by zoning deciisonmakers, and constitues an unconstituonal system of prior restraint.

This hearing does not properly turn on whether Respondent has a non-sexually oriented certificate, and whether Respondent was opeating as a SOBE, because the District has an unconstiutional SOBE regulation scheme, and becaus it is unfair and improper to ask Resopndent or any other layperson to state whehter therir business is a SOBE when rthe DCMR's defnintiOon of a SOBE is vague and overbroad.

1. **The District's Failure to Reasonably Rely on Studies of Negative Secondary Effects Is Fatal to the District's SOBE Regulation Scheme**

69

The Supreme Court has established that a municipality cannot regulate sexually oriented businesses without first reasonably relying on studies demonstrating negative secondary effects from adult entertainment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). Here, the history of the District's SOBE regulation scheme shows no reasonable reliance whatsoever on negative secondary effects studies. One needs only to go to 24 DCR 5144 (Dec. 8, 1977) to see the absence of any reasonable reliance on secondary effects studies. 24 DCR 5144 contains the original final rulemaking that makes up the bulik of the District's current SOBE agency regulations. Although the preamble to thsi rulemaknig states a Zoning Commission "finding" of negative impact from SOBE's, nowhere does the preamble show that any independent studies were conducted and reasonably relied upon, as required by Renton, 475 U.S. at 51-52.

2. **<u>The District's SOBE Regulation Scheme Amounts to Unconstituional Prior Restraint</u>**

Unlike the usual presumption of validity afforded most legislative enactments, "'any system of prior restraint ... comes to this Court bearing a heavy presumption against its validity.'" See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 214, 225 (1990) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975)). The Supreme Court's cases addressing prior restraints "have identified two evils that will not be tolerated in such schemes. First, a scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.'" *See FW/PBS*, 493 U.S. at 226 (quoting *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). "Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *FW/PBS*, 493 U.S. at 226.

Here, the District has a vague and overbroad definition of a SOBE, ane the DCRA has in the past resorted to relying on each Zoning Administrator's interpretation of the SOBE definition. Such a pracitice is not constitutional. *See FW/PBS*, 493 U.S. at 226.

Moreover, the District's system for providing SOBE certificates constitutes a prior restraint. *First*, undersigned counsel understands that such certificates are not even issued, and that no retailer who sells sexually explicite products in the District has a SOBE certificate. Instead, it appears that retailers with high sales of sexually explicit products survive by the grace of avoiding enforcement action, possibly by keeping a low profile in exchange. It further appears that the current enforcement actions against Respondent arise from unconstituionally selective enforcement, apparently driven prmiarily by a very vocal neighborhood association many of whose members do not want an adult bookstore in their backyard. However, in a democracy, the cries of "not in my backyard" must not silence the necessity to enforce laws fairly and evenly.

(71

3. **<u>The Disrtrict's SOBE Regulation Scheme Provides Insufficient Assurances That A SOBE Certificate Will Be Issued and Will Not be Revoked</u>**

The two regulatory provisions for issuing SOBE certificates (11 DCMR 744 and 754) read the same:

> 744.1 A sexually-oriented business establishment shall be permitted in C-3-C districts only, if approved by the Board of Zoning Adjustment in accordance with the conditions specified in § 3108 of chapter 31 of this title, subject to the requirements of this section.
>
> 744.2 No portion of the establishment shall be located within six hundred feet (600 ft.) of a Residential or Special Purpose district.
>
> 744.3 No portion of the establishment shall be located within six hundred feet (600 ft.) of a church, school, library, or playground, or the area that is under the jurisdiction of the Commission of Fine Arts pursuant to the Shipstead-Luce Act, 46 Stat. 366, as amended.
>
> 744.4 No portion of the establishment shall be located within three hundred feet (300 ft.) of any other sexually-oriented business establishment.
>
> 744.5 There shall be no display of goods or services visible from the exterior of the premises.
>
> 744.6 The establishment shall be compatible with other uses in the area.
>
> 744.7 The use shall not become objectionable because of its effect on the character of the neighborhood or because of noise, traffic, or other conditions.
>
> 744.8 The establishment shall not have an adverse impact on religious, educational, and governmental facilities located in the area.

Additionally, the Board of Zoning Adjustment ("BZA") is the sole body that issues SOBE certificates. 11 DCMR 744, 754, and 3108. Not only do 11 DCMR 744 and 754 set forth overly restrictive requirements for qualifying for a SOBE certificate, but 11 DCMR 744 and 754 provide for the BZA to follow 11 DCMR § 3108 in issuing any such certificates:

32

> [T]he Board is authorized to grant special exceptions, as provided in this tittle where, in teh judgment of the Board, those special *exceptions will be in harmony with the general purpose and intent of the zoning Regulations and Maps*, and will not tend to affect adversely the use of neighboring properly in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special condition specified in this title..."

11 DCMR 3108.1 (emphasis added).

> The most constitutionally troubling of the foregoing provisions are the last two provisios:
>
> 744.7 The use shall not become objectionable because of its effect on the character of the neighborhood or because of noise, traffic, or other conditions.
>
> 744.8 The establishment shall not have an adverse impact on religious, educational, and governmental facilities located in the area.

In other words, teh District's SOBE regulation provisions place too much unbridled discrtion in the hands of decisionmakers both in issuing SOBE certificates, but also in revoking them.

It is also constitutionally troubling that not one SOBE provision ever went through the Disrict's elected legislator, but instead was written by unelected agency employees, from the same agency that today is interpreting these regulatory provisions.

Also troubling are the display provisions of the SOBE regulations: "744.5 There shall be no display of goods or services visible from the exterior of the premises." This prohibition flies in the face of the Supreme Court's holding in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). The Court in *Erznoznik* held that "the limited privacy interest of persons on the public streets cannot justify [the] censorship of

73

otherwise protected speech on the basis of its content." *Erznoznik*, 422 U.S. at 212. DCMR 11-744.5 most egregiously runs afoul of Erznoznik for even banning the outside visibility of material that does not show nudity or sexual conduct. Section 128.H.4 DCMR 11-744.5 is so vastly overbroad as to give the Board of Zoning Adjustment authority to refuse a license to a business that has an outside sign promoting a performance of *Hair* or the recent acquisition of *Debbie Does Dallas* on DVD, or even the Playboy bunny logo. Consequently, DCMR 11-744.5 is substantially overbroad and violates the Supreme Court's ruling in *Erznoznik*.

The District's SOBE regulations contain the following two twin evils that make the regulations unconstitutional: Many

> licensing schemes commonly contain two defects: discretion and the opportunity for delay. An ordinance that gives public officials the power to decide whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is invalid... Licensing ordinances must also require prompt decisions. An ordinance that permits public officialsto effectively deny an application by sitting on it indefinitely is also invalid.

Lady J . Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1361 (11th Cir. 1999) (citations omitted).

Additionally, the District's SOBE regulation scheme lacks adequate procedural safeguards by failing to ensure prompt resolution of applications for SOBE certificates. Clearly, "without procedural safeguards to ensure a prompt resolution, an applicant [for an adult entertainment permit] may conclude that seeking a determination is too burdensome a task to pursue, impermissibly chilling the exercise of protected speech." *See 11126 Baltimore Boulevard, Inc., v. Prince George's County*, 58 F.3d 988, 94 (4th Cir. 1995) (citations omitted).

4. <u>Viewing Booths Do Not Make a Business Any More Sexually Oriented Than Do Explicit Magazines</u>

The 1998 Gladys Hicks (former Zoning Administrator) memo automatically equates video viewing booths with a SOBE. However, the Ninth Circuit has recognized that there is nothing unique about booths that should make them be treated any more harshly than the sale of magazines or videos. *City of Los Angeles v. Alameda Books, Inc.*, 222 F.3d 719, (9th Cir. 2000), *rev'd. on other gds.*, ____ U.S. ____, 122 S. Ct. 1728 (2002).

Additionally, more and more studies are revealing that there is no automatic correllation between adult entertainment businesses and negative secondary effects.
it is outdated and unconstitutional to automatically assume negative secondary effects from sexually explicit products. Fulton County, Georgia's experience is a case in point. *See Flanagan Enterprises, Inc., of Georgia v. Fulton County, Georgia*, 242 F.3d 976 (11th Cir. 2001). In Fulton County, a government-commissioned study determined that there was no statistical correlation showing an increase in crime at adult entertainment establishments that served alcoholic beverages. "Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that

78

served alcoholic beverages." *Id.* at 979. Moreover, in mid-1997, Fulton County's six adult entertainment establishments commissioned "a study of the clubs' economic impact on their surrounding environs." *Id.*

In Fulton County, Georgia, "[t]he study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volume and proposed development in the Clubs' vicinities." *Id.* at 979.

It appears that some or most municipalities commission secondary effects studies with the intention of getting study results that justify the intended legislation; that is disingenuous, and does not foster accurate secondary effects studies. In the Fulton County example, as well, it seems that the County hoped that its subsequent study would detract from the privately commissioned study; however, the results of the county-commissioned study similarly revealed no negative secondary effects from adult entertainment. Consequently, the Eleventh Circuit refused to allow Fulton County to use other jurisdictions' secondary effects studies to try to justify Fulton County's adult entertainment zoning regulations. *Flanagan,* 242 F.3d 976

III. <u>CONCLUSION</u>

Consequently, the District has an outdated and unconstutional SOBE regulation scheme. This and other unconstutional laws cannot be enforced.

76

If it is important to the District to continue to regulate SOBE's, then the City Council must introduce and pass constitutional legislation to achieve that goal. For the meantime, there are no constitutional regulations or statutes that permit the enforcement action that is today taking place against Respondent.

Therefore, Respondent moves for the dismissal of all charges against Respondent.

Respectfully submitted

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77

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

Opinion of the Zoning Administrator

Determining Whether a Retail or Wholesale Video Store Selling or Renting Sexually Oriented Materials is a Sexually Oriented Business

Background

In response to letters and complaints received by the Department of Consumer and Regulatory Affairs alleging that certain retail video stores are, or are intended to be operated as, sexually oriented business establishments as that term is defined in the zoning regulations (Title 11 of the District of Columbia Municipal Regulations, Section 199.1), the Zoning Administrator finds it necessary to interpret the zoning regulations in regards to video stores which sell or rent both general interest[1] and sexually oriented materials.[2]

Unless a business has grandfathering rights, sexually oriented business establishments may, with approval by the Board of Zoning Adjustment, be located only in C-3-B, C-3-C, C-4, C-M and M zoning districts. These districts provide ample locations for sexually oriented business establishments, and, accordingly, there is no constitutional requirement that sexually oriented business establishments be allowed in any other zoning district. Businesses and the public, however, have a right to know, in more concrete terms, how many sexually oriented materials, if any, may a mixed use video store offer for sale and/or rental before it must obtain a certificate of occupancy as a sexually oriented business establishment and therefore be prohibited from operating in districts other than those listed above.[3] It is within the Zoning Administrator's

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[1]General interest videos are videos which are not sexually oriented. Stores which carry only general interest videos are "general interest" stores, while stores that carry both general interest and sexually oriented videos are referred to as "mixed use" stores.

[2]"Sexually oriented materials" are those materials which can be characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas, as defined at 11 DCMR § 199.1.

[3] The zoning regulations do not apply an obscenity standard in defining sexually oriented businesses. The Zoning Administrator, therefore, does not believe that in a zoning context it is appropriate to apply a "community standards" test as described in Miller v. California, 93 S.Ct. 2607 (1973.)

(78

interpretive authority to provide such clarification. Pursuant to Reorganization Order No. 555, III. F (D.C. Code Ann. Title 1.-Administration, Appendix at 182, 185 (1973)), the Zoning Administrator "shall be responsible for administratively interpreting and enforcing the zoning regulations." The District of Columbia Court of Appeals has repeatedly recognized this authority, often stating, as it did in Kalorama Citizen's Association v. District of Columbia Board of Zoning Adjustment, 640 A.2d 179 (D.C. App. 1994), that:

> we give "great deference" to the agency's interpretation of its regulations, which we may not reverse unless it is clearly erroneous or inconsistent with the regulations.

It is the purpose of this Opinion to interpret the zoning regulations of the District of Columbia so as to provide standards by which proprietors of mixed use video stores and the public may determine whether a video store is a sexually oriented business establishment.

Discussion

1. Sexually Oriented Business Establishments: Definitions

The zoning regulations at 11 DCMR § 199.1 define a sexually oriented business establishment as follows:

> [A]n establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals, films, materials and articles or an establishment that presents as a substantial or significant portion of its activity, live performances, films or other material which are distinguished or characterized by their emphasis on matters depicting, describing, or related to specified sexual activities and specified anatomical areas.

The terms "substantial," "significant," and "stock in trade" are not defined in the zoning regulations. When a specific word is not defined in the zoning regulations, the Zoning Administrator relies on Webster's Unabridged Dictionary (3rd Edition), to provide clarity.[4] In considering these definitions, the Zoning Administrator concludes that "substantial" means "to a large degree" but not necessarily a majority of a business's stock in trade. This is especially so because "substantial" is used in conjunction with the word "significant." "Significant" is not synonymous with "predominant" or other majoritarian terms, and therefore it is clear to the Zoning Administrator that the Zoning Commission set a standard of less than 50%. In examining a business's stock in trade, the Zoning Administrator will assess "the aggregate of things necessary to carry on the business,"[5] which, in addition to inventory items, includes advertising and promotion activities and signage.

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[4]See the Appendix to this opinion which carries the full definition of each term, with the relevant portions highlighted in bold italic.

[5] Webster's, supra.

29

2. Secondary Effects

The United States Supreme Court has made it clear that the application of zoning restrictions to sexually oriented businesses may be "designed to combat the undesirable secondary effects of such businesses." However, such restrictions must do so "without violating the government's paramount obligation of neutrality in its regulation of protected communication," City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986). Undesirable secondary effects "contribute to neighborhood blight," *Id.*, and include "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life".[6] In addition, in Baltimore Boulevard, Inc. v. Prince George's County of Maryland, 684 F.Supp 884 (1988), while some sections of the county's zoning regulations for adult bookstores[7] were found to be unconstitutional, the section of the regulations that defined adult book stores as having more than 25%[8] of their stock in trade in sexually oriented materials passed constitutional muster.

In sum, it is clear that through zoning, the District may restrict the placement of sexually oriented businesses to protect its citizens from the undesirable secondary effects of such establishments. Furthermore, it appears that in addition to clearly described standards regarding how a business promotes itself, combined with percentage-based formulae will give all the parties concerned clear guidelines. Moreover, the use of numerical standards will serve as a protection against unfair or arbitrary enforcement. Understanding the foregoing, the question then becomes what percentage of sexually oriented materials may a mixed use video store carry or display and what other activities may it engage in without creating undesirable secondary effects. In that regard, to learn what other governments have determined in this respect, and to assess video retailing industry norms, the Zoning Administrator considered the zoning regulations for adult businesses

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[6]From the 1995 resolution of the City Planning Commission of the City of New York. In addition to conducting its own study, New York based its findings on research done by the Town of Islip, New York, Los Angeles, California, Indianapolis, Indiana, Whittier, California, Austin, Texas, Phoenix, Arizona, Manatee County, Florida, New Hanover, North Carolina, and the State of Minnesota, all of which concluded that adult uses tended to produce adverse secondary effects.

[7]At the time the suit in Baltimore Boulevard began, an "adult book store" in Prince George's County was defined as:

> Any commercial establishment that has twenty-five percent (25%) of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

[8]While Baltimore Boulevard was pending, the county lowered the threshold to 5%, and in 1997, it raised the threshold to 10% of a store's inventory. This change went into effect in January of 1998.

(80

promulgated by the City of New York and Prince George's County, Maryland, as well as a recent national survey conducted of approximately 4,000 video stores by the publication Adult Video News.[9]

3. Regulations in Other Jurisdictions and Industry Practices

A. New York City Regulations:

In 1995, in case # N 950384 ZRY, the Planning Commission of the City of New York amended the City's zoning regulations concerning "Adult Establishments." In the amendments, New York defined an adult establishment as follows:

> [A] book store which has a "substantial portion" of its stock in trade in any one or more of the following...video cassettes,[10] or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

In the resolution enacting the zoning amendments, the New York City Planning Commission advised that if more than 40% of a store's stock in trade or retail space was devoted to sexually oriented material, the business would be considered an adult establishment. In addition, New York established a cap of 10,000 square feet of retail space for the display of sexually oriented materials regardless of how much total retail space a store occupies.

B. Prince George's County Regulations:

The County Council has revised inventory percentages twice since Baltimore Boulevard was filed. First, the county lowered its inventory threshold to 5% (from 25%) and then raised the threshold to 10% in late 1997. Regardless of the percentage amount, however, Prince George's County has used inventory percentages to define sexually oriented businesses for at least 10 years.

C. Video Industry Survey:

From 1996 through 1997, Adult Video News conducted a survey of more than 4,000 video

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[9] "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence is relied upon is reasonably believed to be relevant to the problem that the city addresses." In addition, "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Renton, supra. See also FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596 (1990). It is the Zoning Administrator's opinion that this reasoning also applies to the administrative interpretation of regulations.

[10] Because the New York City Regulations were updated, video tapes were included in its definition of materials. While video tapes are not specifically mentioned in the District's zoning regulations, they certainly fall within the category of "other material."

(81)

stores. In its annual publication, "AVN's 1998 Adult Entertainment Guide," the magazine revealed that in stores which carry both adult and general release titles, the adult titles comprise, on average, 18.5% of a store's inventory. In addition, in the Northeast region of the country, the "adult percentage of the video market" is 36%, while the in the Southeast and Mid-South regions the percentages are 11.7% and 9.9%, respectively. The survey also discovered that in the Northeast the average number of adult videos in stores which carried both adult and general interest videos was 700. In the Southeast and Midsouth, the average inventory of sexually oriented video tapes in mixed use video stores was 267 and 279 items, respectively.

4. Survey of Video Stores in the District Which Carry Sexually Oriented Materials

Beginning in November of 1997, the Department of Consumer and Regulatory Affairs conducted a survey (see Appendix II), of all of the 25 mixed use video stores in the District.[11] The purpose of the survey was to determine the percentage and actual number of sexually oriented materials in the respective businesses, as well as the percentage and actual square footage of floor space used in each store for the sale and display of sexually oriented materials. The Department did not include video stores which carried no sexually oriented materials, nor did it survey establishments which have the authority under the zoning regulations to operate as sexually oriented businesses.

As regards the percentage of the inventory represented by sexually oriented materials, the survey showed a broad division into two segments: a high end, beginning at 28%, and a low end, beginning at 6% and reaching no higher than 19%. There were no stores in a middle segment ranging from 20% to 27%. Of the fifteen stores in the high end, nine would exceed New York's 40% standard. Of those, five went beyond 50%, and four of the latter five also offered "sex toys" for sale.[12] All of the fifteen businesses would meet any reasonable interpretation of a "sexually oriented business establishment," as sexually oriented materials are a significant and substantial portion of their stock in trade. In contrast, ten stores at the lower end, which run the gamut from single-store operations to a local chain and a national chain, carried sexually oriented materials in an average of 13% of their total stock.

5. Other Factors

In determining whether sexually oriented materials are a significant or substantial part of a business's stock in trade, the Zoning Administrator thinks it is also appropriate to look at how extensively a video store promotes and/or advertises the sexually oriented materials it has for sale or rental, because advertising and/or promotion are among "the aggregate of things necessary to carry on a business." If a video store expends a substantial effort in advertising or promoting sexually oriented materials, it will likely be perceived as a sexually oriented business, and attract or cause the undesirable secondary effects, such as diminution of property values, and altering

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[11] The Department used the telephone directory, advertisements, and site visits to identify the video stores.

[12] "Sex toys" are further discussed in this opinion under Standards For Determining Whether a Business is Sexually Oriented, Subsection B(1).

(82)

neighborhood character, which the zoning regulations are designed to prevent. Furthermore, in addition to using percentages of retail space and inventory as guidelines, it is appropriate to establish numerical standards. Numerical standards are required, because at some point, even following the percentage guidelines, a business could have such a large number of sexually oriented materials that the store would generate undesirable secondary effects.

In addition, if a video store also sells sexually oriented magazines or books, the Zoning Administrator will determine whether said books or magazines are a substantial or significant portion of all of the magazines and books offered for sale by the business. Similarly, if the sexually oriented materials for sale are new, then the general interest items of the same category which are offered for sale should also be new. This comparison will be made so that video stores will not be able to feign compliance with the Zoning Regulations by carrying used or undesirable general interest items while stocking new, more merchantable, sexually oriented materials.

<u>Conclusions</u>

In assessing the facts, it is clear that there is a significant range between the inventory percentages set by Prince George's County and the City of New York. In addition, the volume of business done in adult videos in mixed use video stores varies dramatically region by region. The Zoning Administrator, however, cannot agree with Prince George's County that if a video store has as little as 10% of its stock in trade in sexually oriented materials it will cause undesirable secondary effects. Nor, on the other hand, can the Zoning Administrator agree that the 40% figure promulgated by New York City will provide an adequate bulwark against undesirable secondary effects.

The District's survey shows that a majority (fifteen) of the mixed use video stores in the District have close to 30% or more of their inventory in sexually oriented materials, with more than half of those stores exceeding even New York City's standards. All fifteen are clearly sexually oriented because sexually oriented materials are a substantial and significant portion of their stock in trade. All fifteen may be expected to cause the negative secondary effects that have been found in the studies and cases referred to above. That these stores already operate in the District in no way implies a contrary finding concerning secondary effects. Rather, the fact is that the District in recent years, due to budget constraints, loss of personnel, restructuring, and other factors, has lacked the resources to enforce all aspects of the zoning regulations, let alone conduct studies to document the effect of such businesses on the surrounding neighborhoods. In addition, neither the Constitution nor the applicable cases require the District to conduct such a study. The concerns raised by residents of at least two neighborhoods about alleged sexually oriented video stores beginning operations provide sufficient basis for the Zoning Administrator to act to interpret the zoning regulations and to devote still-scarce resources to enforce them, before additional businesses commence operations and before existing businesses expand sexually oriented operations without effective regulation.

After considering the measures taken in other jurisdictions, and examining mixed use video stores in the District, the Zoning Administrator believes that a standard approximating the national average of 18.5% of a store's inventory (as reported in <u>Adult Video News</u>), is appropriate.

(83

Therefore, while taking other factors into account, the Zoning Administrator believes that if more than 15% of a store's inventory is comprised of sexually oriented materials, it is a sexually oriented business establishment. This standard accommodates the District's legitimate mixed use video stores which have an average of 13% of their stock in sexually oriented materials, and limits the sale and rental of such items to the kind of accessory or incidental use contemplated by the zoning regulations.

__Standards For Determining Whether a Business is Sexually Oriented.__

Based upon the foregoing, the Zoning Administrator interprets the District of Columbia Zoning Regulations, 11 DCMR §199.1, as is set forth below.

A. A retail or wholesale business has a substantial or significant portion of its stock in trade in sexually oriented materials, and is therefore a sexually oriented business, when any of the factors set forth below in paragraphs 1, 2, 3, or 4 applies:

   1. More than 15% of its inventory on display, in areas open to the public,[13] counted piece-by-piece,[14] are sexually oriented.

   2. It devotes more than 15% of any one of its advertisements (in column inches for print advertising and in air-time seconds for radio and television advertisements) to the sexually oriented materials it sells or rents. For print advertising, the words or pictures describing sexually oriented materials cannot be the only words or pictures in the advertising, and cannot be larger than the smallest pictures and/or typeface advertising non sexually oriented materials. In addition, the Zoning Administrator will consider the use of color, type size, layout or other graphic devices used in the store's advertising to determine whether a disproportionate emphasis has been placed on the store's sexually oriented materials.

   3. Looking at each individual promotional activity separately (which includes but is not limited to contests, guest appearances, discounts, coupons or web site information), the store gives disproportionate emphasis to the sexually oriented materials in its inventory. Factors such as the use of color, type size, layout and other graphic devices will also be considered.

B. Irrespective of the applicability of the factors set forth above, a business establishment is sexually oriented as set forth in either of paragraphs 1 or 2 below:

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[13] "Open to the public" means those areas of the business establishment where customers are ordinarily allowed. Areas that are restricted to minors are considered "open to the public" for this calculation.

[14] Materials in a storeroom or other areas that cannot be seen by customers, whether general interest, or sexually oriented, shall not be counted.

(84)

1. The Zoning Administrator makes the determination that the sale of merchandise such as three dimensional reproductions of human genitalia, and other items which are commonly known as "sex toys," are sexually oriented because such merchandise either "depicts" human genitals and other specified anatomical areas, or are related to specified sexual activities, and that the sale or display of such items is not a customary accessory use to a mixed use video store in the District of Columbia. A business that sells or displays such merchandise is a sexually oriented business.

2. Furthermore, the presence or operation of booths or other apparatuses through which sexually oriented video tapes may be viewed on the premises of a video store, and for which consideration of any kind is charged, is not a customary accessory use to a mixed use video store. A business that provides or operates such apparatuses is a sexually oriented business.

C. After obtaining a certificate of occupancy as a non-sexually oriented business, a business may still be determined to be operating as a sexually oriented business establishment based on the source of its revenues. In making an assessment after a business has opened, the Zoning Administrator may consider, in addition to the other factors discussed herein, the percentage of business, in dollar volume, generated by the establishment's sexually oriented materials, and apply the 15% standard.

In order to ensure that this interpretation of the zoning regulations meets with the approval of the Zoning Commission, a copy of this opinion shall be sent to the Commission for review.

Gladys Hicks

Gladys Hicks,
Acting Zoning Administrator
January 29, 1998

85

APPENDIX

The terms "substantial", "significant" and "stock in trade" are defined below. The portions of the definitions which the Zoning Administrator believes are relevant to this issue have been highlighted in bold italics.

1. [1] **substantial** \sebz'tanchel, -b'st-, -taan-\ adj [ME *substancial*, fr. LL, fr. *substantial*, fr L *substantia* substance + *alis* -al -- more at SUBSTANCE] **1 a** : consisting of, relating to, sharing the nature of or constituting substance : existing as or in substance : MATERIAL ⟨~life⟩ ⟨the~ realities⟩ ⟨most ponderous and~ things -- Shak.⟩ **b** : not seeming or imaginary : not illusive : REAL, TRUE ⟨the~ world⟩ ⟨a mere dream neither~ nor practical⟩ **c** : being of moment : IMPORTANT, ESSENTIAL **2 a** : adequately or generously nourishing : ABUNDANT, PLENTIFUL ⟨set a ~ table⟩ ⟨after that too~ dinner⟩ **b** : Possessed of goods or an estate : moderately wealthy : WELL-TO DO ⟨a~ man⟩; *often* : having a good and well maintained income producing property ⟨a~ farmer⟩ ⟨the more~ tradesman⟩ **c** : considerable in amount, value, or worth ⟨made a~ gain on the transaction⟩ **3 a** : having good substance : firmly or stoutly constructed : STURDY, SOLID, FIRM ⟨a~ house⟩ ⟨~ cloth⟩ b : having a solid or firm foundation : soundly based : carrying weight ⟨a~ argument⟩ ⟨~ evidence⟩ **4 a**: being that specified to a large degree or in the main ⟨a~ victory⟩ ⟨a~ lie⟩ **b**: of or relating to the main part of something **syn** see MASSIVE

   [2] **substantial** \"\ n -s [ME *substancial*, fr. *substancial*, adj.] : something that is substantial as **a** : something having substance or actual existence **b**: something having good substance or actual value **c** : ***something of moment : an important material matter, thing, or part***

2. [1] **significant** \kent\ adj [L significant-, *significans*, pres. part. of *significare* to signify -- more at SIGNIFY] **1** : having meaning; esp : full of import : SUGGESTIVE, EXPRESSIVE ⟨the painter's task to pick out the ~ details -- Herbert Read⟩ ⟨~ anecdote⟩ **2 a** : suggesting or containing some concealed, disguised, or special meaning : standing as a sign or token ⟨perhaps her glance was~⟩ **b** : INDICATIVE ⟨his actions were more~ of his real purpose than were his words⟩ **3 a** : having or likely to have an influence or effect : deserving to be considered : ***IMPORTANT, WEIGHTY, NOTABLE ⟨even though the individual results may seem small, the total of them is ~F. D. Roosevelt⟩*** **b** : characterized by conveyance of an idea, though, or feeling ⟨transform what would otherwise be meaningless juxtapositions or sequences of sensations into~ entities -- Vernon Lee⟩ **c** : probably caused by something other than mere chance ⟨~ decrease in average yearly growth⟩ ⟨statistically~ correlation between vitamin deficiency and disease⟩ **d** : characteristic and essential to the determination of some larger element of a language : DISTINCTIVE ⟨a~ grammatical form⟩ ⟨every language . . . moves within a clearly definable range of ~ speech sounds -- R. A. Hall b. 1911⟩ ⟨the difference between the initial of keel and cool is not~ in English⟩ **syn** see EXPRESSIVE

   [2] **significant** \'\ N-S : something that has or conveys significance : SIGN, TOKEN, SYMBOL

(86

3. **stock-in-trade** \'==-'=\ *n* 1: the equipment necessary to or used in the conduct of a trade or business: as **a** : the goods kept for sale by a shopkeeper **b** : the fittings and appliances of a workman **c** : ***the aggregate of things necessary to carry on a business*** **2** : something held to resemble standard equipment of a tradesman or business ⟨the light an frivolous charm which was her *stock-in-trade* --S. H. Adams⟩ ⟨its civic beauty, its *stock-in-trade*, is being ruined by parked cars -- Janet Flanner⟩ ⟨this motive had been a *stock-in-trade* of medieval art -- Verena Trudel⟩

(87)